IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CIVIL REVISION APPLICATION NO.511 OF 2003

Ramesh Gelababhai Motta
& Anr. .... Applicants
Vs.
Ratilal H. Manek .... Respondent

Shri S.M. Oak for the Applicants.

Sarvasri T.G. Vora with G.K. Vora for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 08, 2004

P.C:

1. Heard the learned Advocates for the parties. The applicants challenge the order dated 18-9-2003 passed by the trial Court allowing the application filed under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree.

2. While challenging the impugned order, the learned Advocate for the applicants submitted that by the impugned order the trial Court has allowed the application under Order 9, Rule 13 of the C.P.C. solely on the ground that the summons in the suit was not properly served upon the respondents and that therefore there was no fair opportunity given to the respondent to contest the suit. According to the learned Advocate for

the applicants, the impugned order discloses that the substitute service was effected in terms of the Order 5, Rule 20 of the C.P.C. pursuant to the order passed to that effect by the trial Court itself and on consideration of the bailiff's report. Being so, there was no occasion for the trial Court to arrive at the conclusion about the failure on the part of the petitioners to take proper steps to serve the summons upon the respondent or denial of fair opportunity to the respondent to contest the proceedings and therefore the findings in that regard by the trial Court to justify the order in favour of the respondent under Order 9, Rule 13 of the C.P.C. are in improper exercise of jurisdiction by the trial Court and hence warrants interference under Section 115 of the C.P.C. The learned Advocate for the respondent, on the other hand, submitted that the trial Court has clearly observed about the failure on the part of the petitioners to serve the respondent in accordance with the procedure known to law and, therefore, no fault can be found with the impugned order. The impugned order apparently discloses that the trial Court, considering the fact that the service of summons under Order 5, Rule 20 of the C.P.C. was not effected in the manner it was required to be effected on the respondent, has held that there was no fair opportunity to the respondent to contest the proceedings and, therefore, has set aside

the ex parte decree which was obtained against the respondent.

3. The impugned order ex facie discloses that the summons was issued to the respondent in the suit, to be served upon him at the suit premises and the bailiff's report dated 16-10-2000 as well as 14-2-2001 disclose that it could not be served upon the respondent as on both the occasions the suit premises were found closed and under lock. It was also further revealed from the pleadings in the plaint itself that the respondent was not using the suit premises at the relevant time. Inspite of those facts on record, it appears that the trial Court allowed the application under Order 5, Rule 20 of the C.P.C. for substitute service by affixing of summons on the suit premises and in fact the service was effected accordingly. Once it was apparent from the records to the trial Court that the defendant was not residing in the suit premises at the relevant time and therefore he could not have been served at the said address and this being known to the Court, there was no occasion for the Court to arrive at the conclusion about the satisfaction which is spoken of under Order 5, Rule 20 of the C.P.C. to enable the Court to permit the plaintiff to serve the defendant by substituted service by affixing of summons on the same premises. Once it was known to the Court that the defendant was not

available in the suit premises, there was no occasion for the Court to believe or get itself satisfied that the defendant was keeping away only for the purpose of avoiding service. In those circumstances, once it was known to the Court about the non-availability of the defendant in the suit premises from the pleadings in the plaint itself, it was but natural that the Court ought to have required the plaintiff to serve the defendant by publication of notice in the newspaper which is normally circulated in the locality. Admittedly, this procedure was not followed in the case in hand and, therefore, the trial Court held that the service of summons was not effected in accordance with the provision of law, as rightly submitted by the learned Advocate for the respondent.

4. The suit having proceeded without proper service upon the defendant and on that count the trial Court having exercised its jurisdiction under Order 9, Rule 13 of the C.P.C. to allow the application to set aside the ex parte decree, such an exercise of jurisdiction cannot be said to be either improper or illegal and, therefore, the same does not warrant interference in revisional jurisdiction under Section 115 of the C.P.C. Hence the revision application is rejected with no order as to costs.